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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 42

JOHN LEE, PETITIONER

vs.

PAUL J. MADIGAN, WARDEN, FEDERAL PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 10, 1957
CERTIORARI GRANTED MARCH 17, 1958

Supreme Court of the United States

OCTOBER TERM, 1957

No. 857

JOHN LEE, PETITIONER

vs.

PAUL J. MADIGAN, WARDEN, FEDERAL PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. 1] **IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

No. 35907-Civil

JOHN LEE, PETITIONER,

- VS -

PAUL J. MADIGAN, the Warden or his successor, Federal Penitentiary, Alcatraz, Island, California, RESPONDENT.

EXCERPT FROM DOCKET ENTRIES

1956

October 15. Filed petition for writ of habeas corpus.

• • • •

October 15. Filed order to show cause, returnable October 18, 1956 at 3 PM. (Harris)

October 17. Ordered hearing on order to show cause advanced to 9 AM, October 18, 1956. (Harris)

• • • •

October 18. Hearing on order to show cause. Richard Foster presented a motion to dismiss. After hearing respective parties, ordered memos. filed and cause submitted on receipt of memos. (Harris)

October 18. Filed motion to dismiss.

October 18. Filed appearance of Counsel. (Robert E. Hannan)

• • • •

November 7. Ordered after hearing ex parte motion of defendant to withdraw motion to dismiss, counsel to present formal motions. (Harris)

November 16. Hearing on ex parte motion for withdrawal of motion to dismiss, return to order to show cause, etc. Plaintiff granted ten days to file traverse to return. Exhibits introduced and case continued to November 30, 1956 for further hearing. (Harris)

November 16. Filed return of defendant to order to show cause.

• • • •

1956

November 16. Filed stipulation for withdrawal of motion of defendant to dismiss.

November 27. Filed traverse of petitioner to return.

• • • •

November 30. Filed appearance of counsel for plaintiff.

November 30. Ordered after hearing case submitted on order to show cause. (Harris)

[fol. 2] 1957

January 23. Filed order denying habeas corpus. (Harris)

January 24. Mailed copies order to petitioner, warden, DA & atty. for petitioner.

February 4. Filed notice of appeal by plaintiff.

February 5. Mailed notices.

February 11. Filed application of plaintiff to proceed in forma pauperis.

February 11. Filed order granting petitioner leave to appeal in forma pauperis. (Harris)

February 12. Mailed copy order to counsel for petitioner.

February 27. Filed appellant's designation of record on appeal.

[fol. 3] IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 35907

JOHN LEE, PETITIONER

vs.

PAUL J. MADIGAN, THE WARDEN, or his successor, Federal Penitentiary, Alcatraz Island, California, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS and AFFIDAVIT IN SUPPORT THEREOF—Filed October 15, 1956

Now comes JOHN LEE, petitioner herein, by his attorneys, Charles Upton Shreve and Carl L. Rhoads, and shows the Court as follows:

1. Jurisdiction of this proceeding is conferred upon this Court under the Habeas Corpus Clause of Article I, Sec. 9 of the Constitution of the United States, Article III, Sec. 2 of the Constitution and Chapter XXIX Manual for Courts-Martial, United States, 1951.

2. That John Lee is a resident of Pennsylvania and a citizen of the United States who resided in Pennsylvania until his induction into the U.S. Army on October 23, 1942.

[fol. 4] 3. That petitioner is restrained of his liberty by virtue of order, warrant and direction of the Attorney General of the United States and his designated agents and employees.

4. That petitioner is now imprisoned by The Warden, Federal Penitentiary on Alcatraz Island, California, and that he is detained on Alcatraz Island, within the jurisdiction of this court.

5. That petitioner was dishonorably discharged from the U.S. Army on June the 12th, 1947 at the Branch United States Disciplinary Barracks, Camp Cooke, California.

6. That petitioner was convicted on September the 13th, 1949 of conspiracy to commit murder and was sen-

tenced to death; said trial arising out of an incident which took place while petitioner was a prisoner at Camp Cooke, California.

7. That petitioner appealed the conviction and the sentence to the Judge Advocate General and by mandatory review, to the Secretary of the Army, Washington, D.C. and the sentence was commuted to life imprisonment.

8. That petitioner was subsequently transferred to the U. S. Penitentiary at Atlanta, Georgia from which he was later transferred to Alcatraz Island, California.

9. That petitioner is now imprisoned by the Warden, U. S. Penitentiary, Alcatraz Island, California, his agents and employees, with offices on Alcatraz Island, California, and that he is detained on Alcatraz Island, California, within the jurisdiction of this Court.

[fol. 5] 10. That the Statute of Limitations of one year precludes the filing of a petition for a new trial.

11. That petitioner has now exhausted his appellate remedies available through the military courts.

12. That petitioner filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of California, Southern Division, being Civil No. 34131, on October 18, 1954, but that an Order was entered October 22, 1954, dismissing petitioner's petition for the reason that:

"The petitioner has filed an application for a Writ of Habeas Corpus challenging the legality of a life sentence imposed by a United States Court Martial on September 13, 1949, upon conviction of the offense of conspiracy to commit murder. The petition states that the offense was committed while the petitioner was a prisoner in the custody of the United States Army at Camp Cooke, California, and after the petitioner had been dishonorably discharged from the United States Army.

"The return to the order to show cause alleges, the accuracy of which petitioner concedes, that petitioner is imprisoned in the United States Penitentiary at Alcatraz, California, under and by virtue of a judgment and sentence of a General Court Martial approved on the 28th day of March, 1947, as modified by an order of the Secretary of the Army on the 16th day of April, 1949, sentenc-

ing the prisoner to a term of twenty years. It was this sentence that the petitioner was in the process of serving when the offense was committed at Camp Cooke, Cali- [fol. 6] fornia, for which the life sentence was imposed. The petitioner does not challenge the validity of the twenty-year sentence, which the records show was imposed for a crime committed by the petitioner when he was a member of the United States Army and while stationed in France. The return also shows that the expiration of the twenty-year judgment and sentence with part good time credit will occur on October 24, 1960.

"It is obvious, therefore, that the petitioner is being detained by the Warden under a valid sentence. In this situation this Court is clearly without jurisdiction to hear the petition. It is only necessary to cite a few of the many cases which support this conclusion.

See: McNally vs. Hill, Warden, 293 U.S. 131;
Dunlap vs. Swope, 9th Cir., 103 F. 2d 19;
Lopez vs. Swope, 9th Cir., 204 F2d 8; and
Butterfield vs. Wilkinson, 9th Cir., No. 14035, decided July 23, 1954.

"The petitioner challenges the jurisdiction of the Army Court Martial over the offense at Camp Cooke. He contends he had been dishonorably discharged two years before the offense was committed and therefore the civil, not the military courts, had jurisdiction. His challenge to that sentence is pre-mature, and therefore this Court does not reach the merits of his petition.

"Since this Court is without jurisdiction, it is

"Ordered that petitioner's petition for a writ of [fol. 7] habeas corpus be and the same is hereby dismissed without prejudice, and the order to show cause heretofore issued out of this Court is hereby discharged."

/s/ Oliver J. Carter,
U.S. District Judge

13. An appeal was taken to the United States Court of Appeals for the Ninth Circuit, San Francisco, California, being case No. 14,608 which was heard on July 28,

1955. An Order was entered, on September 14, 1955, affirming the decree of the United States District Court, Northern District, the appeals court said,

"The district court refused relief because the petition for the writ reveals upon its face that even if the petitioner's attack upon the validity of his conviction by a United States (Army) Court Martial was upheld, it would not act to release the petitioner from custody, since he is also being held under a former unexpired sentence, the validity of which is not attacked.

"Petitioner claims he has been denied "due process" under the Fifth and Sixth Amendments to the United States Constitution, in that the first, or valid sentence, will not expire for around six years and that he may be prejudiced if the validity of the second sentence is not inquired into promptly. The basis for the claim of invalidity is that petitioner was tried [fol. 8] by a United States (Army) Court Martial after petitioner had been restored to civilian status, for an alleged offense committed while he was a member of the United States Army.

"Petitioner seeks to bolster his claim that the district court should have taken jurisdiction and decided the merits of it, by citing *Gutterman* v. *Hiatt, Warden*,. 1946 D.C. Pa., 65 F. Supp. 285, and *U. S. ex rel. Pruett* v. *Hiatt*, 1944, 55 F. Supp. 993. Neither of these cases supports the claim. In fact, they are directly against it. It is true the court in thte Gutterman case, at page 288, said:

' • • • (it) considered petitioner's contentions as to both sentences in order that he may be fully advised in relation thereto.'

"The ruling on the point of using habeas corpus in the circumstances was, however, as follows:

'As already stated, petitioner is restrained by reason of two sentences, either of which considered independently, would not as yet have expired; consequently, if any one of the two sentences is valid, he would not be entitled to immediate release.' (citing numerous authorities.) 65 F. Supp. 285, 288.

[fol. 9] "This court has held to the principle stated in the quotation, in the following cases:
Ex parte Mèlendez, 9 Cir., 1938, 98 F.2d 791;
McNealy v. *Johnston,* 9 Cir., 1938, 100 F.2d 280;
Dunlap v. *Swope,* 9 Cir., 1939, 103 F.2d 19;
Demaurez v. *Squier,* 9 Cir., 1941, 121 F.2d 960;
Graham v. *Squier,* 9 Cir., 1944, 145 F.2d 348
McDonald v. *Johnston,* 9 Cir., 1945, 149 F.2d 768;
Oddo v. *Swope,* 9 Cir., 1951, 193 F.2d 492;
Woollomes v. *Heinze,* 9 Cir., 1952, 198 F.2d 577.

"The Supreme Court of the United States has definitely settled the question in *McNally* v. *Hill,* 1934, 293 U. S. 131, 137, wherein it says:

'There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfullness of the custody and detention, and no suggestion of such use has been found in the commentaries on the English common law.'

"The judgment is affirmed."

14. A Petition for a Writ of Certiorari to the Supreme Court of the United States was filed on December 30, 1955, being case No. 599 and certiorari was denied on February 27, 1956.

15. An appeal was made to the United States Board of Parole, Washington, D.C. to release the petitioner on a parole status from the twenty year sentence, under which he was originally imprisoned, (Petitioner has become eligible for parole consideration from such sentence on January 27, 1953) so that he could begin to serve the [fol. 10] life sentence which petitioner is attacking by this petition for Writ of Habeas Corpus.

16. On September 27, 1956, petitioner, through his attorney, was notified that the Department of the Army had ordered a remittance of the unexecuted portion of the sentence to confinement which was adjudged on May 27, 1946. Therefore as a result of this remittance of the first sentence, the petitioner began to serve the life sentence, (adjudged on September 13, 1949) on September 20, 1956. He is now being imprisoned pursuant to this

life sentence which is being attacked by this petition for Writ of Habeas Corpus. (See exhibits A & B attached hereto)

17. That petitioner is now being illegally imprisoned and in denial of the Fifth Amendment of the United States Constitution inasmuch as the General Court Martial which convicted him on September the 13th, 1949, was without jurisdiction to try the petitioner since he had already been dishonorably discharged from the U. S. Army on June the 12th, 1947, and was a civilian in custody of the Army authorities but not under Army jurisdiction on June the 10th, 1949 when the events took place which gave rise to his second court-martial for which this petition is brought.

18. Petitioner was a civilian in Army control at the time of this alleged offense and hence he should have been tried in the Federal District Court of California which had legal jurisdiction and not by Court Martial which was without legal jurisdiction to try him.

[fol. 11] 19. Petitioner came under civilian legal jurisdiction when a "change of status" was effected as a result of the execution of his dishonorable discharge from the U. S. Army on June the 12th, 1947.

20. In support of this Petition, petitioner has attached hereto, and makes a part hereof, the affidavit of John Lee, which is petitioners Exhibit A.

WHEREFORE, YOUR PETITIONER PRAYS:

That a Writ of Habeas Corpus may be issued to inquire into the cause of the imprisonment and detention of petitioner;

That upon the final hearing of this Petition this Court will enter its Order and Decree declaring that petitioner's imprisonment is illegal and constitutes a denial of due process of law under the Fifth Amendment of the United States Constitution and directing that the said Warden deliver petitioner to the custody of the Federal District

Attorney for the California District to stand trial for this alleged offense.

JOHN LEE
Petitioner

CHARLES UPTON SHREVE

CARL L. RHOADS
Carl L. Rhoads
Attorneys for Prisoner and Petitioner
716 Ford Building
Detroit 26, Michigan
WOodward 2-4056

[fol. 12] Let a writ issue as prayed for in the foregoing petition.

Judge, United States District Court

San Francisco, California

STATE OF CALIFORNIA)
) ss.
COUNTY OF San Francisco)

John Lee, being first duly sworn to state the truth, deposes and says that he is the petitioner named in the foregoing petition, that he has read the same and known the contents thereof, and that the same is true according to his information, knowledge and belief.

JOHN LEE
Petitioner

Subscribed and sworn to before me this 15th day of October, A.D. 1956.

J. B. LATIMER

Associate Warden authorized by the Act of February 11, 1939 to administer oaths.

(SEAL)

[fol. 13] EXHIBIT "A" TO PETITION

AGAO-C Lee, John
(4 Sep 56) PMGK-CC

20 September 1956

In the case of Prisoner John Lee, 33 402 974, confined at the United States Penitentiary, Alcatraz Island, California, the unexecuted portion of the sentence to confinement published in General Court-Martial Orders No. 84, Headquarters, Western Base Section, European Theatre, APO 513, dated 28 March 1947, is remitted.

By Order of Wilber M. Brucker, Secretary of the Army:

/s/ J. M. COLLINS
Adjutant General

[fol. 14] EXHIBIT "B" TO PETITION

DEPARTMENT OF THE ARMY
Office of the Secretary of the Army
Washington 25, D. C.

September 24, 1956

Mr. Carl L. Rhoads
Attorney at Law
19 Salliotte Road
Ecotse 29, Michigan

Dear Mr. Rhoads:

This is with reference to your visit in this office on August 20, 1956, during which you discussed the case of prisoner John Lee with Lt. Colonel Louis L. Haupt.

As Colonel Haupt indicated to you, I interviewed Lee on August 20, 1956, at the United States Penitentiary, Alcatraz, California to determine whether special clemency action might be granted in his case. After careful consideration by the Army and Air Force Clemency and Parole Board upon my return to Washington, it was decided to remit the unexecuted portion of Lee's sentence to confinement adjudged on May 27, 1946.

As a result he will now begin to serve his life sentence adjudged on September 13, 1949.

I am pleased to advise you of this favorable action.

[fol. 15]

Sincerely yours,

WM. J. BACON
Colonel, USA Ret
Special Assistant OSA

[fol. 16] IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
Southern Division

JOHN LEE, PETITIONER,

- VS -

PAUL J. MADIGAN, THE WARDEN, or his successor, Federal Penitentiary, Alcatraz Island, California, RESPONDENT

AFFIDAVIT OF JOHN LEE

STATE OF CALIFORNIA)
) ss.
COUNTY OF San Francisco)

JOHN LEE, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition:

1. That petitioner was dishonorably discharged from the United States Army on June the 12th, 1947.

2. That on June the 10th, 1949, after his dishonorable discharge had been executed on June the 12th, 1947, he became involved in an incident at Camp Cooke, California.

3. That on September the 13th, 1949, he was court-martialed for the alleged offense of June the 10th, 1949, [fol. 17] and was convicted and sentenced to death.

4. That such conviction and sentence were both appealed with the result that the conviction was affirmed and the sentence was commuted to life imprisonment.

5. That petitioner has exhausted his appelate remedies through the military courts.

JOHN LEE
Petitioner

CHARLES UPTON SHREVE

[fol. 18] CARL L. RHOADS
Carl L. Rhoads
Attorneys for Prisoner and Petitioner
716 Ford Building
Detroit 26, Michigan
WOodward 2-4056

STATE OF CALIFORNIA)
) ss.
COUNTY OF San Francisco)

JOHN LEE, being first duly sworn to state the truth, deposes and says that he is the petitioner named in the foregoing affidavit, that he has read the same and knows the contents thereof, and that the same is true according to his information, knowledge and belief.

JOHN LEE
John Lee
Petitioner

Subscribed and sworn to before me this 15th day of October A.D. 1956.

J. B. LATIMER

Associate Warden authorized by the Act of February 11, 1938 to administer oaths.

SEAL

(File Endorsement Omitted)

[fol. 19] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—October 15, 1956

Good cause appearing therefor and upon reading the verified petition on file herein;

IT IS HEREBY ORDERED that *Paul J. Madigan,* Warden of the United States Penitentiary, Alcatraz, State of California, appear before this Court on the *18th* day of *Oct., 1956,* at the hour of 3 P.M. of said day, to

show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the *United States Penitentiary, Alcatraz,* State of California, by mail and that a copy of the petition and this order be served upon the *United States Attorney,* his representative herein.

DATED: Oct. 15, 1956.

GEORGE B. HARRIS
United States District Judge

(File Endorsement Omitted)

[fol. 20] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed October 18, 1956

Comes now PAUL J. MADIGAN, Warden of the United States Penitentiary at Alcatraz, California, through Lloyd H. Burke, United States Attorney for the Northern District of California and Richard H. Foster, Assistant United States Attorney, and moves to dismiss the petition of habeas corpus herein for the following reasons:

1. The petition fails to state sufficient facts to justify the petitioner's release from custody of the respondent.

2. The petition does not state sufficient facts to show that petitioner is in custody in violation of the Constitution, laws or treaties of the United States.

LLOYD H. BURKE
United States Attorney

By Richard H. Foster
RICHARD H. FOSTER
Assistant United States Atorney

(File Endorsement Omitted)

[fol. 21] IN UNITED STATES DISTRICT COURT

APPEARANCE AS OF COUNSEL—Filed October 18, 1956

TO THE CLERK OF THE COURT:

Please enter my appearance as of counsel, in the above-entitled cause, along with Charles Upton Shreve and Carl L. Rhoads, 716 Ford Building, Detroit 26, Michigan (WOodward 2-4056), the attorneys of record.
Dated: October 18, 1956

ROBERT E. HANNON
Attorney at Law
Post Office Building
6475 Castro Valley Blvd.
Castro Valley, California
Jefferson 7-2345

(File Endorsement Omitted)

[fol. 22] IN UNITED STATES DISTRICT COURT

RETURN TO ORDER TO SHOW CAUSE—Filed November 16, 1956

Comes now PAUL J. MADIGAN, Warden of the United States Penitentiary at Alcatraz, California, through his attorneys LLOYD H. BURKE, United States Attorney, and RICHARD H. FOSTER, Assistant United States Attorney, and JAMES W. GRANT, Special Assistant United States Attorney, and for return to order to show cause, states as follows:

I

Petitioner is confined in the United States Penitentiary at Alcatraz, California by virtue of a sentence by a General Court-Martial on September 13, 1949 imposing the death penalty which was later commuted by the President of the United States to life imprisonment as set forth in Paragraph IV below.

II

That the record of the General Court-Martial was reviewed by the Staff Judge Advocate and the sentence was approved by the Convening Authority on November 17, 1949.

III

That the record of trial was reviewed by a Board of Review in the Office of The Judge Advocate General in the Department of the Army on March 29, 1950 and found legally sufficient to support the findings and the sentence, that the record of trial was thereafter on July 20, 1950 reviewed by the Judicial Council in the Office of The Judge Advocate General in the Department of the Army [fol. 23]and found legally sufficient to support the findings and sentence.

IV

That on October 4, 1950, The Judge Advocate General of the Department of the Army concurred in the opinions of the Board of Review and the Judicial Council and submitted the record of trial to the Secretary of the Army who on October 5, 1950 concurred therein and forwarded the record of trial to the President of the United States; that on October 9, 1950 the President of the United States commuted the sentence of the Court-Martial to confinement at hard labor in a United States Penitentiary for the term of the natural life of the petitioner and ordered the sentence as commuted into execution.

V

That the petitioner has not exhausted his administrative remedies by petitioning The Judge Advocate General of the Department of the Army for a new trial pursuant to the provisions of the 53rd Article of War (41 Stat. 787), as amended by the Act of June 24, 1948 (62 Stat. 639), or pursuant to Section 12 of the Act of May 5, 1950 (64 Stat. 147; 50 U.S.C. 740).

VI

Attached to the original hereto and made a part hereof as Exhibit A is a copy of the record of trial of the General Court-Martial referred to in Paragraph I above.

VII

Attached to the original hereto and made a part hereof as Exhibit B is a copy of the opinion of the Staff Judge Advocate and the action of the Convening Authority re-
[fol. 24] ferred to in Paragraph II above.

VIII

Attached to the original hereto and made a part hereof as Exhibit C is a copy of the opinion on the Board of Review, a copy of the opinion of the Judicial Council, and a copy of the Order of the President of the United States, referred to in Paragraphs III and IV above.

IX

Attached to the original hereto and made a part hereof as Exhibit D is a Certificate of the Acting The Judge Advocate General of the Department of the Army of the non-existence of a record of petition referred to in Paragraph V above.

WHEREFORE, since the petitioner has not exhausted his administrative remedies pursuant to the 53rd Article of War, as amended, supra, nor pursuant to Section 12 of the Act of May 5, 1950, supra, and since the Court Martial by which the petitioner was tried had jurisdiction, and since the petitioner is properly in his custody, respondent prays that the order to show cause be discharged and that the petition for habeas corpus be denied. Dated: November 6, 1956.

LLOYD H. BURKE
United States Attorney

By RICHARD H. FOSTER
Assistant United States Attorney

[fol. 25] By JAMES W. GRANT
Special Assistant United States Attorney

(File Endorsement Omitted)

[fol. 26] IN UNITED STATES DISTRICT COURT

STIPULATION—Filed November 16, 1956

IT IS STIPULATED by and between attorney for petitioner and attorneys for respondent that the motion to dismiss heretofore filed may be withdrawn, and a re-

turn to order to show cause inter-alia, incorporating the whole record of petitioner's courts martial and a review thereof, substituted therefor.

LLOYD H. BURKE
United States Attorney

By RICHARD H. FOSTER
Assistant United States Attorney
Attorney for Respondent

ROBERT E. HANNON
Attorney for Petitioner

(File Endorsement Omitted)

[fol. 27] IN UNITED STATES DISTRICT COURT

TRAVERSE TO RESPONDENT'S MEMORANDUM OF LAW—
Filed November 27, 1956

This traverse will deal only with the question of whether or not petitioner committed the murder for which he was convicted, in "time of peace" in the sense intended in Article of War 92 (10 U.S.C. 1564).

A separate traverse dealing with the question of whether or not petitioner has exhausted his administration remedies under Article of War 53 (U.S.C. 1525), or Section 12 of the Act of May 5, 1950 (64 Stat. 108; 50 U.S.C. .740) is attached hereto and is made a part of petitioners Traverse to Respondent's Memorandum of Law.

PETITIONER WAS CONVICTED IN TIME OF PEACE.

Respondents contend that June the 10th, 1949, when the incident took place which culminated in the general court-martial conviction of petitioner, on September the 13th, 1949, for murder committed in the Camp Cooke, California, Disciplinary Barracks, was not "in time of peace" in the sense intended in Article of War 92 (10 U.S.C. 1564). In support of their contention they have cited the World War I case of *Kahn* v. *Anderson*, 255 U. S. 1; as standing for the principle that "time of peace"

means, "not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed." In that we agree but in order to determine what the court meant [fol. 28] with such words, we must look at the facts of the case.

In *Kahn* v. *Anderson*, supra, the accused had been placed on trial, before a general court-martial, on November 4, 1918, for murder in violation of the 92d Article of War. The trial continued until November 25. 1918, when the petitioner was found guilty as charged. On June 11, 1920, a petition for Habeas Corpus was filed to obtain his release from the United States Disciplinary Barracks, Leavenworth, Kansas. Among other grounds alleged in the petition was the one,

> 4. "That in no event had the court-martial power to try them for murder under the conditions existing at the time of the trial." Here the petitioners had argued, "that, because, when the trial occurred, it was time of peace, no jurisdiction existed to try for murder, as article 92 provided that "—no person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace "That complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities, is not disputable. *Hamilton* v. *Kentucky*, Distilleries and Warehouse Co., 251 US 146"—*See McEbrath* v. *United States*, 102 US 426, where it was expressly decided that the limitation "except in time of peace", on the power of the President to summarily dismiss a military officer, contemplated not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed.

[fol. 29] Indeed, in that case it was pointed out that this significance of the words had received the sanction of Congress, and had been made the basis for the adjustment of controversies depending upon the time when peace was established."

We are in full accord with the principle which the Court laid down in *Kahn* v. *Anderson*, supra, wherein they held that the signing of the Armistice on November

11th, 1918, did not result in, "time of peace" so as to cause the court-martial, which had convened on November 4th, 1918, to lose jurisdiction over the person and the offense of murder. There had been, "a mere cessation of hostilities" not "peace in the complete sense, officially proclaimed." The Armistice of World War I, November 11th, 1918, has the same legal significance as the cessation of hostilities in World War II, on August 14th, 1945. Neither has the effect of inaugurating, "time of peace." Article 43, Statute of Limitations, "Uniform Code of Military Justice", 1950, states,

> E. "In the case of any offense the trial of which in time of war is certified to the President by the Secretary of the Department to be detrimental to the prosecution of the war or inimical to the national security, the period of the limitation prescribed in this article shall be extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress."

"The President's proclamation on December 31, 1946, and the Joint Resolution of Congress on July 25, 1947 (P.L. 239, 80th Cong., 61 Stat. 449) have been held to [fol. 30] have officially declared the end of World War II," *Corpus Juris Secundem*, Volume 93, Paragraph 42, "Termination of War and Treaties of Peace."

"The cessation of hostilities in World War II occurred on August 14, 1945. The President's proclamation of the cessation of hostilities has been held not to be an official termination of a state of war Crudon v. Cloyd W. Miller Co., D.C. Ohio, 74 F. Supp. 546, 333 US 138, 92 L. Ed. 596, 68 S. Ct. 421 but it nevertheless inaugurates peace in fact *"Crudon* v. *Cloyd W. Miller Co.*, supra."

The Presidential Proclamation terminating hostilities on December 31, 1946, has been held to have "inaugurated" "peace-in-fact" though it did not mark the termination of the war." *Crudon* v. *Cloyd W. Miller Co.*, supra. The Joint Resolution of Congress, July 25, 1947 (P.L. 239, 80th Cong., 61 Stat. 449, did terminate the war within the meaning of Article 43, "Statute of Limitations," *Uniform Code of Military Justice*, 1950, whereas is stated,

"Except as otherwise provided in this article, a person charged with desertion in time of peace or any of the offenses punishable under articles 119 through 132 inclusive shall not be liable to be tried by court-martial or punished under Article 15 if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command."

The Joint Resolution, is titled, "To terminate certain [fol. 31] emergency and war powers." It provided for the termination of a large number of emergency and war powers but we will direct our attention only to those which have a material bearing on the issue in the case at bar.

> First, it terminated "Section 69 of the National Defense Act of June 3, 1916, as amended by section 7 of the Act of June 15, 1933, (48 Stat. 156); The provision authorizing the extension of enlistments in the Regular Army or the Enlisted Reserve Corps, in force at the outbreak of war or entered into during its continuation, for six months after its termination contained in the Act of March 15, 1940 (54 Stat. 53, 61).

Second, it terminated the special authority by which the Statute of Limitations was tolled as to certain offenses when committed "in time of war"—Act of June 4, 1920 (41 Stat. 794) so that after July 25, 1947, the peace time statute of limitations as to prosecution for all offenses other than those specially excepted again became operative. All during World War II such Statute of Limitations had not been in effect.

The Joint Resolution of Congress, July 25, 1947, has been universally accepted by the United States Court of Military Appeals as having inaugurated "time of peace" so as to bring into application the peace-time statute of limitations which had been revoked "in time of War", by Presidential proclamation.

"For desertion in time of peace the period of limitation prescribed by Article of War 39 upon trial and punish- [fol. 32] ment by courtmartial was three years. World War II was terminated by Congress with respect to Ar-

ticle of War 58 on 25 July 1947 (P.L. 239, 80th Cong., 61 Stat. 449). The offense of desertion in this case is alleged to have been committed on 26 April 1948. It is thus apparent that the statute of limitations had run against the offense."

This was very clearly stated in the general court martial case decided, 30 August 1951, *United States* v. *Taylor*, 1 CMR 293.

The same rule has been applied in every other Court-Martial case involving the offense of desertion.

United States v. *Meyer* 1 CMR 562, affirmed in *United States* v. *Meyer* 2 CMR 70;
United States v. *Schauf* 2 CMR 325, 328;
United States v. *Nichols* 2 CMR 484, affirmed in *United States* v. *Meyer* 6 CMR 27;
United States v. *Johnson* 6 CMR 810;
United States v. *Nichols* 6 CMR 27;
United States v. *Johnson* 10 CMR 557;
United States v. *Taylor* 11 CMR 428;
United States v. *Brown* 11 CMR 618;
United States v. Ayers 12 CMR 413.

It is quite persuasive that Congress has seen fit to adopt the Joint Resolution of July 25, 1947, as marking the end of World War II in determining what is "war time" service as to determine the World War II veterans eligibility for a large number of disability and other educational [fol. 33] benefits. At 42, U.S.C. 417 "Benefits for veterans" (d) (I) it provides "The term "World War II means the period beginning with September 1940 and ending at the close of July 24, 1947."

Counsel for the respondents have argued in their briefs that murder which is spelled out under Article 118, of the "Uniform Code of Military Justice", 1950 and Article 92, of the "Articles of War", 1949, which governs the case at bar, was not intended to be included as one of the offenses for which the Joint Resolution of July 25, 1947, made "time of peace". It is interesting in this connection that diligent search in this regard has failed to disclose any cases wherein Court-Martial jurisdiction has been asserted over the offense of murder when committed in the

continental United States between July 25, 1947, and the beginning of the Korean conflict, June 27, 1950. The Lee case at bar seems to be the only one wherein Court-Martial jurisdiction was asserted over this offense committed during such period. It certainly seems very likely that the offense was committed in the continental United States by some military personnel during this three year period but it would thus appear that jurisdiction over such offense committed in the continental United States was relinquished to the civil authorities. It is true that Article 118, "Murder" is not included within the articles enumerated in Article 43 (b), "Statute of Limitations" and falling within the class, "of the offenses punishable under Article 119, "Manslaughter", a lesser included offense of Article 118, "Murder" is one of the offenses for which the three year statute of limitations applies "in time of peace."

[fol. 34] Why isn't "Murder" included under Article 43 (b)? To get the answer we look at Article 43 (a) "Statute of Limitations."

"A. A person charged with desertion or absence without leave *in time of war*, (emphasis added) or with aiding the enemy, mutiny or *murder* (emphasis added) may be tried and punished at any time without limitation"

The meaning of the above sub-paragraph is crystal clear. Congress did not intend that there be any statute of limitations for aiding the enemy, mutiny or murder or for desertion or absence without leave "in time of war". But in every case where the issue of "time of war" and "time of peace" has come up in desertion and absence without leave cases the United States Court of Military Appeals has accepted the July 25, 1947, Joint Resolution of Congress, date as having inaugurated "time of peace."

United States v. Taylor (supra)
United States v. Schauf (supra) United States v. Meyer
United States v. Johnson (supra) United States v. Brown
United States v. Nichols (supra) United States v. Ayers

To attempt to argue that Congress did not intend to appeal the July 25, 1947, "time of peace" date to the crime of murder is contrary to the accepted rules of statutory

interpretation. "Murder" is one of the offenses provided for in Article 43 (a) along with "desertion or absence without leave in time of war" to say that the "time of [fol. 35] peace" rule applies to some of the offenses in the sub-paragraph and not to others in the same sub-paragraph certainly flaunts the cardinal principle of statutory interpretation to the effect that the statute will be read and interpreted in its entirety so as to determine the intent of the legislature.

It is interesting, in this same connection, to note that Article 118, "Murder," in the "Uniform Code of Military Justice", 1950 does not have the same provisions as "The Manual for Courts-Martial, U.S. Army, 1949, The Article of War, Article 92, "Murder-Rape" which in addition to defining the offenses adds,

"Provided, that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia *in time of peace.*" (emphasis added).

The 1949 Manual is the one which controls in the case at bar. It is well recognized that if a member of the armed forces commits an act or omission by which he violates the uniform code and the local criminal law, the act or omission may be made the basis of a prosecution before a court-martial or before a proper civil court, and in some cases before both. "Manual for Courts-Martial," 1951, Paragraph 12, Page 16. But this general rule can only be applied if the person accused is a "person subject to the code". If he is a "civilian", as in the case at bar, when the offense was committed two years after discharge, then clearly the courts-martial has no jurisdiction at all over him and he is a "person" within the meaning of the Fifth and Sixth Amendments to the United States Consti- [fol. 36] tution so as to guarantee him the right, "not to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury *except in cases arising in the land or naval forces* (emphasis added), Amendment V, and "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed,*" (emphasis added.) Amendment VI.

In the case of petitioner Lee the general court-martial was without jurisdiction to try him even if he had not been discharged from the Army, for two years, prior to the date of the alleged offense. They were without jurisdiction because Congress had clearly limited the courts-martial jurisdiction, in the 1949 Manual, but not in the 1951 Manual, in the case of "murder or rape" to offenses committed not "within the geographical limits of the States of the Union and the District of Columbia in time of peace." Congress has been very careful to reserve jurisdiction over the subject matter of "murder and rape" in the United States "in time of peace" to the civil authorities to the absolute exclusion of the military. That is certainly understandable since they are clearly civil offenses and as such are better tried in the civil courts where the constitutional safeguards will be recognized and applied. There is no excuse for trying them by a military tribunal since they are not military offenses and the oft quoted "exigencies of the service" reasoning certainly cannot be applied so as to rob a civilian court of jurisdiction over a "civilian" person, in the continental United States in 1949, a "time of peace" in the common [fol. 37] sense as well as in the judicial sense.

For the respondents to argue that we were not in "time of peace" on June the 10th, 1949, merely because the Japanese treaty was signed on April 28, 1952, is not only to refuse to take judicial notice of the fact that the only real peace which has been enjoyed in the United States since Pearl Harbor was the period between July 25, 1947, and June 27, 1950, the beginning of the Korean Conflict as well as to refuse to accept the numerous decisions which have been laid down by the United States Court of Military Appeals to the effect that after July 25, 1947, was "in time of peace" for purposes of military jurisdiction over "peace time" offenses.

The fact that an amnesty and pardon was granted by Presidential Proclamation of December 24, 1952, 67 Stat. C. 24, so as to restore rights of citizenship "to all persons who deserted from the Armed Forces of the United States on or after August 14, 1945, and prior to June 25, 1950" certainly had no bearing on the crime of murder

as concerns "time of peace" or "time of war". It is very apparent that respondents are confusing "time of war", "time of peace" and "war powers". All of the cases which they have cited the exception of *Kahn* v. *Anderson*, supra, have no relation to the fundamental issue involved in the case at bar—did the United States Army have legal jurisdiction over the person of John Lee, and the offense of murder, allegedly committed on June 10th, 1949, two years after he had been discharged from the Army and two years after the Joint Resolution of Congress had "officially declared the end of World War II"? There are [fol. 38] many cases which respondents have quoted which stand for the principle that the July 25, 1947, Joint Resolution of Congress, date did not have the effect of terminating certain "war powers" of the President of the United States. Some of these continued up until the signing of the final treaty with Japan on April 28, 1952, and in fact by virtue of the Korean Conflict have, in fact, never been curtailed except in so far as the Congress has seen fit to do so by special congressional action. Some examples of such authorities which have been erroneously quoted by respondents as standing for the principle that June 1949 was "in time of war" for court-martial jurisdiction over murder in the United States are:

> Waller v. United States, 78 F. Supp. 816, No. 48602, 114 Ct. Cl. 640 (Court of Claims, decided June 28, 1948) wherein the Court of Claims held that the President, by virtue of his "war powers" still had authority to renegotiate defense contracts with government suppliers.
>
> *Wood* v. *Cloyd W. Miller Co.*, 68 S. Ct. 421, decided February 16, 1948, held that the President of the United States had authority under his "war powers" to regulate rents in "critical areas" even after the Presidential Proclamation of December 31, 1946, which marked the "termination of hostilities."

This type of case wherein the President is exerting "war powers", which are civil in nature, certainly has no relevance to the issue of criminal jurisdiction.

For the above reasons, we respectfully submit that the Army, general court-martial, which convicted petitioner, [fol. 39] Lee, of murder on September 13, 1949, at Camp Cooke, California, was entirely devoid of Jurisdiction over either the person or the subject matter and hence this petition for Habeas Corpus should be granted so as to permit the petitioner to be tried by a court which has jurisdiction over both the person and the subject matter—the civil offense of murder.

Respectfully submitted

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(File Endorsement Omitted)

[fol. 40] IN UNITED STATES DISTRICT COURT

APPEARANCE OF COUNSEL—Filed November 30, 1956

To the Clerk of said Court:

Please enter my Appearance as of Counsel, in the above entitled cause, along with Charles Upton Shreve and Carl L. Rhoads, 716 Ford Building, Detroit 26, Michigan, (WOodward 2-4056), the attorneys of record, and Robert E. Hannon, 6475 Castro Valley Boulevard, Castro Valley, California, as of counsel.

Dated: November 28, 1956.

WILLIAM F. HANNON
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(File Endorsement Omitted)

[fol. 41] IN UNITED STATES DISTRICT COURT

ORDER DENYING ISSUANCE OF WRIT OF HABEAS CORPUS—January 23, 1957

Petitioner, serving a life sentence in the federal penitentiary at Alcatraz, California, for murder committed in the Camp Cooke Disciplinary Barracks in 1949, seeks his release by means of a writ of habeas corpus. He contends that the general court martial which convicted him of the offense charged under Article 92 of the Articles of War (10 U.S.C.A. 1564) lacked jurisdiction. On June 12, 1947, he had received his dishonorable discharge from the Army. Petitioner was serving a 20-year sentence at the said barracks for the crime of armed robbery committed as a member of the United States Army while stationed overseas in France.

Petitioner relies on two bases for challenging the authority of the general court martial to proceed against

him. First, he alleges that he was a civilian,—having been dishonorably discharged; second, that he committed the crime in time of peace and hence was entitled to a trial by the civilan authorities.

Petitioner was subject to general court martial jurisdiction insofar as his status as a civilian was concerned. Article of War 2 (10 U.S.C.A. 1473); In re Craig, 70 F. [fol. 42] 969; Kahn v. Anderson, 255 U. S. 1; McDonald v. Lee, 217 F.2d 619. As stated by the Supreme Court in the Kahn case, at page 7: " . . we are of opinion that, even if their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since, as they remained military prisoners, they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment."

Petitioner's second point, namely, that he committed the offense "in time of peace," has been decided adversely by several courts, including the Ninth Circuit in the recent case of Osborn v. Swope, 230 F.2d. 397. In Kahn v. Anderson, supra, and Givens v. Zerbst, 255 U.S. 11, the Supreme Court held that "in time of peace," as used in the 93rd Article of War, means "peace in the complete sense officially declared." Re-establishment of peace is a matter for political determination, rather than a question for the courts.

Since the United States did not conclude its final peace treaty until several years after petitioner committed his offense, the general court martial exercised its proper power under Article of War 92. The Presidential Proclamation of April 28, 1952, entitled, "Termination of the National Emergencies, Proclaimed on September 8, 1939, and May 27, 1941," 66 Stats. C., stated:

> [fol. 43] "The state of war between the United States of America and Japan, which was the last of the aforesaid states of war still existing, was terminated by the coming into force this day of the treaty of peace with Japan signed in San Francisco on September 8, 1951."

Thus, World War II was officially concluded and *peace*, for purposes of general court-martial jurisdiction, was realized.

It is to be noted that the military authorities themselves have construed "time of peace" in a manner consistent with that enunciated by the early case of Kahn v. Anderson, supra, and as subsequently followed by the above cited authorities. Thus, in the trial of one Hightower, Court Martial 325200, 74 Board of Review 103, 117-118, the military court held that peace had not been officially proclaimed nor had treaties of peace been ratified with all nations with which a state of war existed. Accordingly, it correctly assumed that it had jurisdiction to proceed with the trial of the offense charged.

When petitioner, together with three associates, caused the death of another prisoner in the Camp Cooke Disciplinary Barracks on June 10, 1949, the general court martial had jurisdiction to try him for the crime of murder. The court martial transcript was admitted in evidence in the case and is part of the record before the court. It shows that petitioner participated in a wanton murder for which he received the death penalty. By [fol. 44] Presidential intervention the sentence was commuted to life imprisonment.

Respondent in his argument before the Court contended that petitioner had failed to exhaust his administrative remedies under then Article 53 of War (10 U.S.C.A. 1525).[1] and therefore this Court could not entertain his petition. Both Osborn v. Swope, supra, and Kethel Osborne v. Swope, 226 F.2d 908, support respondent's view. These cases, following the Supreme Court holding in Gusik v. Schilder, 340 U.S. 128, hold that a civil court [fol. 45] has no jurisdiction to inquire into the validity of a court martial conviction unless the remedy for re-

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[1] Article of War 53 (now superseded by Article 73, 50 U.S.C.A. 740). The Judge Advocate General of any of the Armed Forces is authorized "in his discretion to grant a new trial, or to vacate a sentence, . . . in any court martial case in which application is made within one year after final disposition of the case upon initial appellate review: Provided, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, which-ever is the later: . . ."

hearing provided for under Article of War 53 is exhausted. The fact that time has barred petitioner from exercising his rights under Article 53 does not permit this Court to grant relief by means of a writ of habeas corpus according to the expression of the above cited Ninth Circuit cases. If the general court martial had lacked jurisdiction over petitioner in the first instance, he would then be entitled to an immediate release. Thus it was and is appropriate that this Court determine the question of jurisdiction in the first instance.

As stated above, the authorities, including this Circuit, hold that the crime charged was committed in time of war. Thus, the general court martial had jurisdiction to proceed and there is no merit to the petition for writ of habeas corpus.

Accordingly, IT IS ORDERED that the application for writ of habeas corpus be, and the same hereby is, DENIED; the order to show cause be, and the same is, DISCHARGED; and the petition be, and the same is, DISMISSED.

DATED: JANUARY 23, 1957.

GEORGE B. HARRIS
United States District Judge

(File Endorsement Omitted)

[fol. 46] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed February 4, 1957

TO LLOYD H. BURKE and RICHARD H. FOSTER, UNITED STATES ATTORNEYS FOR THE NORTHERN DISTRICT OF CALIFORNIA, POST OFFICE BUILDING, SEVENTH & MISSION STREETS, SAN FRANCISCO, CALIFORNIA:

Notice is hereby given that petitioner, JOHN LEE, through his attorneys, CARL RHODES, CHARLES UPTON SHREVE and ROBERT E. HANNON, hereby appeals to the United States Court of Appeals For The Ninth Circuit from the order, judgment and decree of

the United States District Court for the Northern District of California, Southern Division, denying issuance of a writ of habeas corpus, made and entered on January 23, 1957.

DATED: January 30, 1957.

ROBERT E. HANNON

(File Endorsement Omitted)

[fols. 47-51] • • •

[fol. 52] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 53] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
July 9, 1957

(Omitted in Printing)

[fol. 54] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—
Filed October 11, 1957

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 55] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,466

Oct. 11, 1956

JOHN LEE, *Appellant*,

vs.

PAUL J. MADIGAN, Warden, Federal Penitentiary, Alcatraz, California, *Appellee*.

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPINION—October 11, 1957

Before: LEMMON, FEE and BARNES, Circuit Judges

BARNES, Circuit Judge:

This is an appeal from a denial of a petition for a writ of habeas corpus.[1] Petitioner is in the custody of the Warden of Alcatraz Prison by virtue of a judgment and sentence of a General Court-Martial approved September 13, 1949. Petitioner was sentenced originally to death. Thereafter the sentence was reduced to life imprisonment.

The crime of conspiracy to commit murder, of which petitioner was convicted, occurred on June 10, 1949, at the Disciplinary Barracks at Camp Cook, California. Petitioner was then serving a sentence imposed by a previous Court-Martial in Paris, France, of twenty years at hard labor for robbery and assault. Those offenses were committed while petitioner was in the Army. After his Paris court-martial and sentence petitioner was dishonorably discharged from the Army on June 12, 1947.

This is the second time petitioner has been before this Court. In 1954, petitioner took an appeal from a District [fol. 56] Court order dismissing his petition for a writ of habeas corpus as being prematurely brought. We affirmed that order. *Lee* v. *Swope*, 225 F.2d 674 (1955). Thereafter

[1] 28 U.S.C.A. § 2253.

the Army Clemency Board remitted the unexpired portion of petitioner's first sentence so that on September 20, 1956, he commenced to serve and was imprisoned only under the life sentence which is the subject matter of the present petition.

Appellant maintains that on the date of his second court-martial he must be classified within one of two classes—either "civilian" or "a member of the armed forces"; that because of his previous dishonorable discharge on June 12, 1947, he was of necessity a "civilian" on June 10, 1949, when the murder was committed, and subsequently when he was tried; that after his discharge he was "in custody of the Army authorities, but not under Army jurisdiction." He also contends that the crime was committed in "time of peace"; that World War II officially terminated almost two years prior to the date of the offense.

Thus petitioner challenges the jurisdiction of the General Court-Martial (a) over the crime of murder, because he could not be tried for "murder or rape when committed in the Continental United States in time of peace" under the Manual for Court-Martial (1949) then in effect. Article of War 92 (10 U.S.C.A. §1564); (b) over his person, because as a civilian, petitioner was entitled to a civil trial by jury under the Sixth Amendment.

I. Was the crime for which petitioner was convicted and is now serving a life sentence a crime committed "in time of peace"?

The vital date is June 10, 1949. In the leading case arising out of World War I, the language "time of peace" was defined as meaning "peace in the complete sense, officially declared." *Kahn* v. *Anderson*, 225 U.S. 1, 10.

The question of when a state of war has ceased officially is for the political organs of the federal government to determine. *Ludecke* v. *Watkins*, 335 U.S. 160.[2] The war

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[2] See Woods v. Miller Co., 333 U. S. 138. Cf. The Protector, 79 U.S. 700; Ribas Y. Hijo v. United States, 194 U.S. 315; Hamilton v. Kentucky Distilleries, 251 U.S. 146.

Petitioner refers us to the cases passing on that difficult question, the police activity commonly known as the Korean War. That conflict, for many reasons, seems sui generis. With no declaration

[fol. 57] with Germany was terminated on October 19, 1951 by a Joint Resolution of Congress [3] passed that day and a Presidential Proclamation [4] promulgated pursuant thereto. This Court has previously applied this date in considering the language of Article 92. *Floyd Osborn v. Swope*, 230 F.2d 395. The war with Japan was terminated on April 28, 1952, the effective date of the Japanese Peace Treaty, signed in San Francisco on September 8, 1951.[5]

While the question presented is not judicial but political in nature, it is petitioner's assertion that a legislative ascertainment in his favor is contained in the Joint Resolution of Congress of July 25, 1947.[6] He argues that this Joint Resolution, passed "to terminate certain emergency war powers", evinces a Congressional intent to terminate the state of war. However, the absence of any reference in the Joint Resolution to Article of War 92, while specific reference is made to other Articles of War dealing with desertion (10 U.S.C.A. §1510-1511), leads us to conclude that petitioner's argument is without merit. The aforementioned dates, October 19, 1951, in respect to Germany as was held in the Osborn case, and April 28, 1952 as to Japan, mark the official termination of hostilities with those Nations insofar as Article of War 92 is concerned.[7] Accordingly,

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of war, there appeared little reason for, or purpose to, any proclamation purporting to end that which never commenced. Under such circumstances it is obvious that there had to be some judicial interpretation as to what Congress meant in using the phrase, "in time of war", as applied to the realities of the Korean conflict. We have no quarrel with those cases cited by petitioner to the effect that "*in the absence of* formal Executive or Legislative action, . . . a collection of factors" compelled the judicial conclusion that a "time of war" existed, which terminated with the Armistice in Korea on July 27, 1953. No such dearth of political pronouncements in respect to the official termination of World War II exists.

[3] 65 Stat. 451.

[4] Proclamation No. 2950, October 24, 1951, 66 Stat. c3.

[5] Proclamation No. 2974, April 28, 1952, 66 Stat. c31; Proclamation No. 2974, December 24, 1952, 67 Stat. c24.

[6] 61 Stat. 449.

[7] See also Knauff v. Shaughnessy, 338 U.S. 537, where on January 16, 1950, the Supreme Court said in another context: "Indeed a state of war still exists."

[fol. 58] at the time of the commission of the crime, a state of war existed between the United States and both Germany and Japan.

We are satisfied that the petitioner did not commit the offense for which he was convicted in time of peace.

II. Was petitioner entitled to a civil trial by jury, as a "civilian", for the crime charged to have been committed on June 10, 1949?

Article of War 2(c), 10 U.S.C.A. §1473,[8] rendered amenable to military law, including trial by military tribunal, "All persons under sentence adjudged by courts-martial". It cannot be doubted that the petitioner occupied this status both when he committed and when he was convicted of the crime of conspiracy to commit murder. Hence our sole concern is with the constitutionality of this statutory provision.

The issue is drawn even more narrowly by the fact that the Supreme Court unanimously upheld the validity of this Article in *Kahn* v. *Anderson*, supra. That decision reaffirmed an old line of cases holding that once military jurisdiction attached, it could continue to be exerted until exhausted completely. There is dictum that this would be true irrespective of the intervening discharge of the accused.[9] The specific question for this Court to decide is whether the subsequent Supreme Court opinions in *United States ex rel Toth* v. *Quarles*, 350 U.S. 11, and two consolidated cases, *Reid* v. *Covert* and *Kinsella* v. *Krueger*, 354 U.S. 1, decided June 10, 1957, in any way modify the language of Article 2(e), as interpreted in *Kahn* v. *Anderson*.

The Supreme Court in the *Toth* case specifically upheld

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[8] This section was superseded by Article 2(7) of the 1950 Uniform Code of Military Justice which subjects to military jurisdiction, "All persons in custody of the armed forces serving a sentence imposed by a court-martial".

[9] Carter v. McClaughry, 183 U.S. 365; In re Craig, 70 F. 969; ex parte Wildman, 29 Fed. Cases 1232, No. 17,653a. Decisions subsequent to the Kahn case restating the rule of law sustained therein include Moser v. Hudspeth, 10 Cir., 123 F.2d 401; Mosher v. Hunter, 10 Cir., 143 F.2d 745; McDonald v. Lee, 5 Cir., 217 F.2d 619; Steele v. Humphrey, 80 F.Supp. 544.

the Article of War 2(e). It also held that Congress could not constitutionally subject a discharged serviceman who "had no relationship of any kind with the military" to [fol. 59] trial by court-martial for a crime allegedly committed while he was serving in the armed forces.[10] Toth was arrested five months after he had received an honorable discharge and had been "wholly separated" from the Air Force.

In *Reid* v. *Covert* and *Kinsella* v. *Krueger*, the Supreme Court held that Congress could not constitutionally provide for trial by court-martial of civilian dependents accompanying military personnel overseas.[11] Coincidentally, each of those cases involved a civilian wife who had been charged and convicted of murdering her serviceman husband.

The common denominator of all three decisions, as well as the basis for them, is that the defendant in each case was a civilian with absolutely no present relationship to the military. They were all full-fledged civilians when they were tried. Toth was an ex-soldier; Mrs. Covert and Mrs. Smith never were in the armed forces. The Supreme Court regarded trial by military authorities of such persons as inimical to fundamental Constitutional safeguards guaranteed civilians. As stated by the Supreme Court in the *Covert* case,

> "The Milligan, Duncan and Toth cases recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians. In each instance an effort to expand the jurisdiction of military courts to civilians was repulsed."

Petitioner's status was far different. He was subject to military jurisdiction when he was charged, tried, convicted and sentenced for his first offenses, robbery and assault. He remained under military jurisdiction and in military

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[10] The Supreme Court therefore held invalid Article 3(a) of the 1950 Uniform Code of Military Justice.

[11] The Supreme Court therefore held invalid as applied Article 2(11) of the 1950 Uniform Code of Military Justice.

custody while serving his initial sentence. He was a military prisoner. His relationship to the military, like that of the defendant in the *Kahn* case, was close and continuing; in *Toth*, *Covert* and *Krueger*, the relationship was non-existent.

A general rule of law, heretofore noted, and firmly established long before the *Kahn* case was decided, is that [fol. 60] once jurisdiction attaches, it is retained until fully exhausted. In *Carter* v. *McClaughry*, 183 U.S. 365 and *Kahn* v. *Anderson*, supra, the Supreme Court applied this well-settled rule of law to military jurisdiction. As the Supreme Court declared in the *Carter* case at p. 383,

> "He was a military prisoner though he had ceased to be a soldier; and for offenses committed during his confinement, he was liable to trial and punishment by court-martial under the rules and articles of war."

Accordingly, the military was exercising jurisdiction over the petitioner when he committed the instant offense and when he was tried. The technical dishonorable discharge constituted a severance from the military for certain purposes, including the deprivation of various benefits, but it is unthinkable to regard it as a vitiation of all military authority over the petitioner. The Tenth Circuit, in *Mosher* v. *Hunter*, 143 F.2d 745, sets forth what we believe to be a correct statement of the law.

> It is generally true, as contended, that courts-martial jurisdiction is coexistent and coterminous with military service and ceases upon discharge or other separation from such service (Sec. 10, Chap. 4, Manual of Courts-Martial U.S. Army, 1928), and it does not extend to offenses committed against military law by those who are subsequently discharged or otherwise separated from such military service, unless courts-martial jurisdiction first attached before separation from the service, in which event jurisdiction continues until fully exhausted. (citations omitted.) Furthermore, all persons under sentence adjudged by a court-martial are subject to military law, . . . and are therefore within the jurisdiction of courts-martial for of-

fenses committed against military law. This is true although his military service ceased before jurisdiction attached and before trial and sentence."

The distinction in the relationship to the military between the petitioners in the case at bar and the *Kahn* case, and the defendants in the three latest Supreme Court decisions is crucial. We are of the opinion that none of these recent decisions destroys or undermines the *Kahn* case. The opinion in *Covert* and *Krueger* makes no men- [fol. 61] tion whatsoever of *Kahn*. *Toth* is closely in point. At least he was at one time subject to military authority and discipline; yet at the time he was tried, as the Suprement Court states repeatedly and with emphasis,[12] he was "wholly separated" from the military and had no existing relationship to it at all. There is but one reference in the *Toth* opinion to the *Kahn* case. Summarizing the law in this area, the Supreme Court stated:

> "This Court has held that the Article I clause just quoted authorizes Congress to subject persons actually in the armed services to trial by court-martial for military and naval offenses. Later it was held that court-martial jurisdiction could be exerted over a dishonorably discharged soldier then a military prisoner serving a sentence imposed by a prior court-martial. It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions." 350 U.S. 11, 14.

Viewing those words in the light most favorable to petitioner's position, it cannot be said that they in any way

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[12] At three different points in the opinion the Supreme Court stresses Toth's complete divorcement from the military. "At the time of arrest he had no relationship of any kind with the military," 350 U.S. at 13; "It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions," 350 U.S. at 14; "But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades." 350 U.S. at 22.

cast doubt on the legal vitality of the *Kahn* case. At best they represent a mere statement of existing law. Certainly there is no rejection or disapproval of that law.

Article of War 2(e), by its express language and the holding in the *Kahn* and *Toth* cases, is controlling.

III. Did petitioner exhaust his other remedies?

In view of the conclusions reached by us with respect to petitioner's claim of lack of jurisdiction, as set forth [fol. 62] above, it is unnecessary to consider the Government's contention that petitioner did not exhaust his remedies.

The order of the District Court denying petitioner's application for a writ of habeas corpus and dismissing such petition is *Affirmed*.

(File Endorsement Omitted)

[fol. 63] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15466

JOHN LEE, *Appellant*,

vs.

PAUL J. MADIGAN, Warden, Federal Penitentiary, Alcatraz, California, *Appellee*.

JUDGMENT—Entered October 11, 1957

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(File Endorsement Omitted)

[fol. 64] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. 394 Misc.

(Title Omitted)

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Ninth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—
March 17, 1958

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. Case transferred to the appellate docket as No. 857.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE, 1958 465963 1497